

take the job which Woolf had offered him, and the same applied to the other members of his family, all of whom were to be employed by Woolf.

The point was taken before the Police Magistrate that this particular dwelling-house was exempted from the operation of reg. 30A, but the Magistrate held that the exemption did not apply in the present case, and according to the affidavit sworn by Woolf, the Magistrate in giving his decision said—"I find that the dwelling-house does not come within reg. 30AB (5) (b). I think that that regulation is confined to dwellings of a much narrower class." The Police Magistrate had earlier stated that he thought that the exemption was designed to cover such a case as a dwelling appurtenant to a church. I think the Magistrate misdirected himself. The house was one which had been erected for the accommodation of a class of persons, namely, Woolf's employés, and there is no justification for narrowing the regulation down as the Police Magistrate has suggested.

The affidavit sworn yesterday by the solicitor for the applicant, Jeremiah, sets out the correspondence which passed between him and the clerk of petty sessions, and recites a letter from the clerk in which are set out what purport to be the findings of the Police Magistrate in the case. It may be that in their present form these findings are not strictly admissible, but even if we accept these findings as truly setting out the conclusions which the Magistrate reached, and the reasons he held for rejecting the contentions on behalf of Woolf, it still appears that he misdirected himself. The relevant part of such "findings" reads—"I find that the dwelling the subject of this application is not a dwelling to which reg. 30AB (5) (b) applies. Although this dwelling with several others was originally erected for the purpose of housing employees of the owner engaged on his orchard or in his packing shed, his action in allowing them to be otherwise occupied from time to time takes them out of the provision of the regulation in my opinion."

There is no doubt, I think, and indeed the Magistrate in his findings so states, the house was erected for the purpose of housing the employés of the owner engaged on his orchard or in his packing-shed, and so it comes within reg. 30AB (5) (b). And the evidence is that the house has always been used for this purpose. The Magistrate's view that the house had assumed some other character than a house erected or acquired for the accommodation of employés would thus appear to be entirely unfounded. But even if the house had been used for some other purpose in the meantime, it would seem sufficient to bring it within the exemption that it should appear that it (1) was erected or acquired for the accommodation of a particular person or class of persons; and (2) was at the relevant time

required for the occupation of that person or a person of that class.

The first requirement is established on the Magistrate's own finding. The second he does not appear to have considered, having misdirected himself as to the first.

The question is, what should I do about the matter? Should I send it back to the Magistrate or deal with it myself? The evidence on the subject is all set out in the material before me, and there is nothing to suggest that the Magistrate did not accept the uncontradicted evidence on the subject. No good purpose, therefore, can be served by sending the matter back to the Magistrate.

The evidence was, I think, all one way, and it established conclusively that the house was required for the occupation of an employé and that that requirement so required was reasonable. I think a finding to the contrary on the evidence would be untenable. Roberts had been engaged by Woolf as an employé; his services were needed and he could not take up his employment unless the house was available to him. Whatever way the matter is approached, whether we consider Woolf or Roberts, the dwelling-house is reasonably required, and I therefore conclude that this dwelling-house falls within the exemption. One cannot but regret that the result is that Jeremiah finds himself without a house, but I must give effect to the law as I find it, and this house is not one of those houses which the regulation-making authority has provided should be available for protected persons, if they are unoccupied or about to become unoccupied.

For these reasons the order *nisi* will be made absolute and the order of the Court below set aside.

Order absolute.

[Solicitors—For the respondent, E. P. Johnson and Davies; for the applicant, John P. Rhoden.]

F. M. B.

Before Barry, J.

Feb. 5, 6, 11.

ATTORNEY-GENERAL v. CITY OF KEW.

Local Government — Poll as to rating upon unimproved capital values—Irregularities in conduct of poll—Mandatory or directory provisions—Application of common law as to elections—Local Government Act 1946 (No. 5203), sec. 325.

The common law rules with respect to elections apply to a poll conducted pursuant to Part XI. of the Local Government Act 1946.

At a poll conducted to determine whether a proposal should be adopted for rating upon unimproved capital values, an officer at one of the polling-booths failed to supply some voters with the number of voting papers to which they were entitled. The total number of papers under supplied was insufficient to have had any effect upon the result of the poll.—

Held that, as the irregularity did not strike at the poll in its entirety and did not affect the result, the poll was not invalidated by the irregularity.

Bridge v. Bowen, 21 C.L.R. 582, (1916) A.L.R. 253, applied.

TRIAL OF ACTION.

An action was commenced in the name of the Attorney-General and Albert Samuel George Stevens against the Mayor, Councillors and Ratepayers of the City of Kew. The defendant had conducted a poll pursuant to Part XI. of the Local Government Act 1946, to decide whether the proposal that the defendants should levy rates upon the unimproved capital values of properties should be adopted. The poll was held on the 28th August, 1947. The total number of votes for which voters were enrolled was 13,334. The result of the poll was that 3202 valid votes were cast for and 2996 valid votes against the proposal. It was admitted by the defendants that, owing to a mistake of one officer in charge of a polling-booth a total of 156 votes were wrongly withheld from ratepayers (including those of the plaintiff Stevens). In addition it was alleged by the plaintiffs that votes were also wrongly withheld at other polling places from three other voters. The plaintiffs claimed a declaration that Part XI. of the Local Government Act 1946 had not been adopted in the municipality, and also claimed injunctions restraining the defendants from adopting Part XI. of the Act and levying rates according to unimproved values.

Section 325 of the Local Government Act 1946 is as follows:—"The following provisions shall apply 'with respect to every poll under this Part: (5) 'Every person whose name is on the municipal roll 'shall be entitled to receive as many voting papers 'as the number of votes to which such person appears 'by such roll to be entitled."

Winneke and Gilbert for the plaintiffs.

Norris and Bergere for the defendant.

Cur. adv. vult.

BARRY, J., read the following judgment:—This action is brought by the Attorney-General of Victoria, on the relation of Albert Samuel George Stevens, a ratepayer of the municipality of the city of Kew, and the said Stevens, to restrain the Council of that municipality from making and levying rates in respect of rateable properties in the municipality upon the basis of the unimproved capital values thereof.

Part XI. of the Local Government Act 1946 (No. 5203) deals with rating on unimproved values. It may be adopted in any municipality by a determination of the council of the municipality, or by a proposal for its adoption being carried by a poll—Local Government Act 1946, sec. 314. One-tenth of

the persons whose names are inscribed on the municipal roll may address a written demand to the chairman or the clerk of the municipality that a proposal to adopt Part XI. be submitted to a poll of the ratepayers—sec. 316 (1). The provisions relating to the poll then to be held are contained in Division 4 of Part XI., and the point upon which this action depends concerns the proper construction of sec. 325 of the Act.

It appears that a poll was demanded by the requisite number of ratepayers, and the statutory preliminaries having been observed, the poll was held on the 28th day of August, 1947. It resulted in 3202 votes being cast for and 2996 votes against the proposal. On these figures, therefore, the proposal was carried by a majority of 206 votes. It appears, however, that the presiding officer at one booth did not issue to certain ratepayers as many voting papers as the municipal roll showed them to be entitled to receive. It is agreed that the number of votes thus wrongly withheld was 156. Had these votes been cast against the proposal for the adoption of Part XI. it would still have been carried. There is evidence which is controverted that the proper number of voting papers was not delivered to three other ratepayers at other booths, but the number of votes thus involved would not have been sufficient, with the 156 voting papers admittedly wrongly withheld, to affect the result, even if all had been cast against the proposal.

Section 325 is in the following terms:—[His Honour read the section.]

In support of the plaintiffs' case Mr. Winneke contended (i) that being a statutory corporation, the municipality can acquire the power to rate on unimproved values only by the means prescribed by the Act; (ii) that the means prescribed must be strictly followed to be effective to clothe the municipality with that power; (iii) that sec. 325, sub-sec. (5) confers on each ratepayer the right to receive as many voting papers as the number of votes to which he appears by the municipal roll to be entitled; (iv) that it is an essential condition of an effective poll that each ratepayer who seeks to exercise that right shall be accorded it; and (v) that as the right was withheld from certain ratepayers, the poll was invalid and the power to rate on unimproved values has not been acquired.

Mr. Norris, for the defendant, conceded Mr. Winneke's first proposition, but contested each of the other contentions on which plaintiffs' case is based.

Mr. Winneke rested his argument mainly upon sec. 325 (5). This sub-section, he contended, is imperative or mandatory. Necessarily his argument led him to the position that even if one voting paper were wrongly denied to a ratepayer entitled to receive it, then however large the majority for or against the proposal, the poll would be a nullity.

When sub-sec. (5) of sec. 325 is examined, however, it will be seen that its terms do not direct any act to be done; it is a declaration of a right. The political machinery in general use in this community commonly enables each voter to cast one vote only—*cf.* Local Government Act 1946, sec. 119. Under the Local Government legislation, in certain instances plural voting is permitted, however, and the voter is entitled to cast the number of votes for which he is enrolled—*cf.* Local Government Act 1946, sec. 120. So as to place the matter beyond doubt, sub-sec. (5) declares that for the purpose of voting at a poll upon a proposal to adopt Part XI., each person whose name is on the municipal roll shall be entitled to receive as many voting papers as the votes to which he is shown by the municipal roll to be entitled. If there were no provision in the Act, the existence of the right would by implication impose upon the appropriate officer the duty of seeing the right was yielded to persons asserting it. But sub-sec. (6) of sec. 325 concerns itself with that very duty, and there is no need, therefore, to have recourse to implication. In Part III., sec. 140 (taken with sec. 136) imposes upon the presiding officer at each polling booth the duty "to deliver to each voter "who requires the same a ballot paper or if such "voter appears by the roll to be entitled to give "more votes than one then so many ballot papers "as may be equal to the number of votes not exceeding three which such voter so appears to be "entitled to give." The sanction for the performance of the duty is found in sec. 152, which provides that any such officer who is guilty of any wilful misfeasance or wilful or negligent act of commission or omission, contrary to the provisions of Part III., shall be liable to a penalty of £50.

It is clear, I think, that unless the circumstances showed that there was no real electing at all, or the election was not really conducted under the subsisting election laws—*Woodward v. Sarsons*, (1875) L.R. 10 C.P. 733; *Bridge v. Bowen*, 21 C.L.R. 582, (1916) A.L.R. 253—the failure by a presiding officer to perform a duty cast upon him would not nullify the election. This view is in conformity with the opinion of the Judicial Committee in *Montreal Street Railway Company v. Normandin*, [1917] A.C. 170 at p. 175, where it was observed that, "when the "provisions of a statute relate to the performance "of a public duty and the case is such that to "hold null and void acts done in neglect of this "duty would work serious general inconvenience or "injustice to persons who have no control over "those entrusted with the duty, and at the same "time would not promote the main object of the "Legislature, it has been the practice to hold such "provisions directory only, the neglect of them,

"though punishable, not affecting the validity of "the acts done." See also *The Queen v. Laffrègue and Wilson*, (1866) L.R. 1 Q.B. 423; *In re Lloyd. Ex parte Leaker*, (1867) 4 W.W. & A.B. (L.) 226.

In *Bridge v. Bowen* (*supra*) at p. 591, Griffith, C.J., said—"It has never been doubted that the common law applicable to Parliamentary elections is applicable to municipal elections"—(1916) A.L.R. at 256. In that case (at pp. 623-4) Isaacs, J. (with whom Gavan Duffy and Rich, JJ., concurred), summarised the law relating to the impeachment of elections. Two of the propositions he formulated may be quoted. "If there has been any official "irregularity in the conduct of an election, where "the law requires absolute and strict adherence or "where the irregularity is so great as to depart "substantially from a directory enactment, his "selection so-called is void unless (the successful "candidate) can show the result could not have "been affected by it." "Where the defect complained of does not strike at an election as an "entirety, but is confined to some breach of law in "individual instances, then he is not necessarily "affected, and is not affected at all unless he or his "majority is shown to be connected with the "defect"—(1916) A.L.R. at p. 268. Had the irregularities here relied on occurred in a municipal election the election, nevertheless, would have been valid. Is there anything that prevents the principles I have discussed from being applicable to a poll of the kind in question? The provisions of sec. 325 (6), that "all proceedings shall be had and taken "as nearly as may be as upon an election of "councillors under the provisions of Part III.," are an explicit direction that the rules which govern municipal elections shall be applied to the poll so far as circumstances admit. The rules applicable consist not only of the statutory provisions, but also of what Griffith, C.J., called, in *Bridge v. Bowen* (*supra*), at p. 586, "the common law of elections"—(1916) A.L.R. at p. 254. An election is a method used to enable a majority of electors to choose a representative or representatives to serve upon a particular body. A poll of the kind here under consideration is a method used to determine whether a majority of electors approves or disapproves of a specific proposal. The purpose in each case is to ascertain the will of the majority of those who vote upon the issue. The particular purpose differs, but the general purpose is the same. I can see no reason, therefore, why the principles of the common law relating to the efficacy of an election should not be applied to this poll.

Upon the facts of this case, the result of the application of the common law of elections is that the challenge to the poll fails and with it the action. Accordingly, there will be judgment for the

NICHOLAS v. COMMISSIONER OF TAXATION

defendant, with costs to be taxed. Certify for statement of claim.

Action dismissed, with costs.

[Solicitors—For the plaintiffs, Madden, Butler, Elder and Graham; for the defendant, Rylah and Rylah.]
N. S. S.

High Court of Australia.

Before Williams, J. (Sydney). Dec. 1, 12, 1947.

NICHOLAS v. COMMISSIONER OF TAXATION.

Revenue—Income tax—Trust of income—For benefit of settlor's infant children—Assessment of trustee—To include infants' income—Income Tax Assessment Act 1936-43, sec. 102 (1) (b).

Section 102 of the Income Tax Assessment Act 1936-43, which renders assessable to income tax the trustee of a trust where income thereunder is applicable for the benefit of infant unmarried children of the creator of the trust, treats the whole income of the trust estate as a single fund, and taxes it even though only part of the income of the trust estate is applicable for the benefit of infant unmarried children of the creator of the trust.

APPEAL.

By a deed of trust dated 12th March, 1941, David Thomas Nicholas made a settlement upon his wife, Grace Marie Nicholas, in respect of 4000 shares in F. W. Williams and Co. Pty. Ltd., in trust as to one-fourth for the donee absolutely and as to the residue to divide the income until his death amongst his children. During the year of income 1942-43 the trustee received £750 in dividends, and she became entitled to one-fourth of that amount, and an adult son to one-fourth, and two infant sons to the balance. In assessing the trustee for income tax, the Commissioner applied sec. 102 (1) (b) of the Income Tax Assessment Act 1936-43, and assessed her for £325 10s.

An objection to the assessment was disallowed and was treated as an appeal.

Hooke and O'Meally for the taxpayer appellant.
Leslie for the Commissioner.

Cur. adv. vult.

WILLIAMS, J., read the following judgment:—The appellant, Grace Marie Nicholas, is the sole trustee of a deed dated 12th March, 1941, whereby her husband, David Thomas Nicholas, settled 4000 shares in F. W. Williams and Co. Pty. Ltd., as to one-fourth upon trust for her absolutely, and as to the other three-fourths upon trust until his death to divide the income equally amongst such of his children as should be living at the time of the said income being received, and on his death upon trust to divide

the capital amongst his children and their issue as therein mentioned.

The settlor is still alive and has three sons, one of whom was over twenty-one and the other two were under twenty-one and unmarried in 1943. During the year of income ended 30th June 1943 the appellant received £750 in dividends from the trust fund which was divisible under the deed £175 to herself, £175 to the adult son and £175 to each of the infant sons. She was assessed as the trustee of the deed under sec. 102 (1) (b) of the Income Tax Assessment Act 1936-43 for £325 10s., being the amount of tax payable upon £350 representing the infants' proportions of the dividends.

The sum of £325 10s. was stated in the assessment to be the amount by which the tax actually payable by Davis Thomas Nicholas on his own taxable income was less than the tax which would have been payable by him if he had received the income of that portion of the trust which was in favour of the two infant children. The assessment was objected to on a number of grounds, but the objection was disallowed and the taxpayer has appealed to this Court. Grounds four, six, eight and nine in the notice of objection were not pressed on the appeal.

It was submitted that the appeal should succeed on the grounds that: (1) A trustee cannot be assessed under sec. 102 because the Legislature has failed to declare a rate of tax in respect thereof. (2) Section 102 (1) (b) does not apply to the income of a trust where the beneficiaries comprise adults as well as children of the creator of the trust who are under the age of twenty-one and unmarried. (3) If sec. 102 (1) (b) was intended to apply to such a trust it cannot operate because there is no machinery for calculating the share of the net income of the trust on which tax is to be paid in the absence of any provision for the apportionment of that net income. (4) If there is to be an apportionment of the net income of such trust between beneficiaries who are adults and beneficiaries who are such children there must also be an apportionment of the income between each of such children and the trustee must be assessed separately in respect of the income of each such child.

(1) Section 6 of the Income Tax Assessment Act 1936-43 defines income tax to mean the income tax imposed as such by any Act as assessed under this Act. Section 17 provides that income tax at the rates declared by the Parliament shall be levied and paid for the financial year . . . upon the taxable income derived during the year of income by any person. The Income Tax Act 1943 provides that income tax is imposed at the rates declared by this Act. Section 5 (8) provides that the rate or rates of tax payable by a trustee shall be as set out in the sixth schedule to this Act. The sixth schedule prescribes the rates of tax payable by a trustee where a trustee is liable